

LAW OFFICES  
**GOLDBERG, GODLES, WIENER & WRIGHT LLP**  
1229 NINETEENTH STREET, N.W.  
WASHINGTON, D.C. 20036-2413

HENRY GOLDBERG  
JOSEPH A. GODLES  
JONATHAN L. WIENER  
DEVENDRA ("DAVE") KUMAR

HENRIETTA WRIGHT  
THOMAS G. GHERARDI, P.C.  
COUNSEL

THOMAS S. TYCZ\*  
SENIOR POLICY ADVISOR  
\*NOT AN ATTORNEY

(202) 429-4900  
TELECOPIER:  
(202) 429-4912

e-mail: [general@g2w2.com](mailto:general@g2w2.com)  
website: [www.g2w2.com](http://www.g2w2.com)

August 8, 2016

**ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: *Ex Parte*, MB Docket No. 16-42, CS Docket No. 97-80**

Dear Ms. Dortch:

This is to inform you that on August 4, 2016, Matthew Zinn, Senior Vice President, General Counsel, Secretary & Chief Privacy Officer, and Dr. Joseph Weber, Chief Technical Officer for the Service Provider Business Unit, of TiVo Inc. ("TiVo") and the undersigned (collectively, the "TiVo Representatives") spoke via telephone with Chief Technologist Scott Jordan and Gigi Sohn, Jessica Almond, and Eric Feigenbaum in Chairman Wheeler's office in connection with the above-captioned proceeding to promote competition in the market for consumers' video navigation devices.

The TiVo Representatives shared their views on the MVPD app proposal ("MVPD Proposal") as described in an *ex parte* filing on June 16<sup>1</sup> and in a more recent filing that purportedly responds to questions from Commission staff.<sup>2</sup> NCTA and

---

<sup>1</sup> Letter from Paul Glist, Davis Wright Tremaine LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (June 16, 2016).

<sup>2</sup> Letter from Paul Glist, Davis Wright Tremaine LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80 (July 22, 2016); NCTA & AT&T, Response to Questions About Open Standards HTML5 Apps-Based Approach, MB Docket No. 16-42, CS Docket No. 97-80 (July 21, 2016) ("MVPD Response to Questions").

AT&T's responses to the questions from the FCC regarding the MVPD's "app" proposal still leave some questions unanswered, although based on the answers they do provide, it is clear that the MVPD Proposal would not facilitate device competition and consumer choice as required by Section 629 and would not meet the goals of the *NPRM*. Indeed, the MVPD Proposal is functionally the same proprietary app proposal presented as part of the DSTAC process that would deny consumers the benefits of innovation and competition in user interface and ancillary features, with the only meaningful difference being that large MVPDs would be required to provide apps rather than simply doing so on a voluntary basis. The MVPD proprietary app proposal was considered and rejected by the Commission in the *NPRM* as not achieving the goals of Section 629,<sup>3</sup> and was similarly criticized by the administration.<sup>4</sup> Nothing has changed with the latest iteration of the MVPD app proposal to justify a departure from these earlier conclusions.

The TiVo Representatives explained, as they and others have in the past, that the MVPD App proposal would represent a significant step backwards from the features and functionality that consumers enjoy today using CableCARD-enabled devices. The Commission's successor solution to CableCARD should enable greater innovation and consumer-friendly features, and not leave consumers with no meaningful choice other than simply viewing some of the programming they have paid for on different screens via an operator controlled user experience. Under the MVPD Proposal, competitive devices would *lose* functionality they have today and no longer be able to:

- develop their own full-featured, innovative user interface;
- enable home recording;

---

<sup>3</sup> *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18, at 10 ¶ 16 (rel. Feb. 18, 2016) ("*NPRM*") ("The [app] arrangements have not assured a competitive retail market for devices from unaffiliated sources as required by Section 629 because they do not always provide access to all of the programming that a subscriber pays to access, and may limit features like recording. In other words, these . . . proprietary apps . . . do not offer consumers viable substitutes to a full-featured, leased set-top box. Moreover, these [apps] . . . to date have only provided access to the MVPD's user interface rather than that of a competitive device.").

<sup>4</sup> Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, United States Department of Commerce, to Chairman Tom Wheeler, Federal Communications Commission, MB Docket No. 16-42, Apr. 14, 2016, at 3 ("*NTIA Letter*") (noting that the MVPD app approach gives subscribers "limited competitive choice in the ways that they may access or navigate programming or integrate complementary features and services" and that "it does not address — let alone resolve — the competitive concerns at the heart of Section 629.").

- enable ancillary features, such as streaming recorded content to devices such as tablets;
- allow consumers to view a fully-populated third party electronic program guide (“EPG”) and browse, select, and switch back-and-forth between channels without switching between different “apps”;
- set recording options, “favorites,” parental control settings, audio settings, etc. directly from the device user interface; and
- enable fully-functional integrated search or a personalized recommendation engine that includes all of the MVPD and OVD content sources the consumer has access to.

Each of these features is possible today for TiVo and other CableCARD-enabled competitive devices. The TiVo Representatives explained that without such features and functionality available from competitive options, consumers would have no meaningful choice to replace their MVPD-supplied leased set-top box and would be denied the benefits of competition central to Section 629.

The TiVo Representatives also discussed the following limitations of the MVPD Proposal:

#### No Equivalent Access to Programming

NCTA and AT&T’s response makes clear that MVPD apps running on competitive navigation devices would not necessarily provide consumers with all the programming they have paid for and that they would have access to if they used a leased set-top box.<sup>5</sup> In other words, competitive navigation devices running MVPD apps would not be a replacement for an MVPD-supplied set-top box, and would fail to meet the most basic goal of Section 629. This would also represent a move backward from the status quo, since subscribers using competitive devices using CableCARDs today have access to *all* of the linear programming that they pay for. In addition, the MVPD Proposal will apparently deliver content to “smart TVs or other TV-connected devices”, but it is not clear that subscribers will be able to watch the programming they have paid for through competitive user experiences on mobile devices such as tablets — something that a TiVo user can do today.

---

<sup>5</sup> MVPD Response to Questions at 8-9.

## No Competitive User Interface

Under the MVPD Proposal, competitive devices would not be able to provide their own user interface to view MVPD programming, denying consumers the benefits of one of the major sources of innovation.<sup>6</sup> Though NCTA and AT&T claim that the MVPD Proposal would allow competitive devices to use their own UI, the reality is that such a “top level” UI will be nothing like the competitive UIs available today from CableCARD-enabled competitive devices such as those developed and sold by TiVo. TiVo users today can view programming choices using a fully-populated EPG and browse, select, record, and set future recording options using TiVo’s award-winning UI. In contrast, under the MVPD Proposal, competitive device users will only be able to select *some* programming using the device’s UI after which they will be sent to a landing page within the MVPD app. From that point forward, including when they pause, stop, or wish to switch channels, consumers will remain within the MVPD app unless they take the additional step of quitting the app (and likely having to respond to a “are you sure you want to quit the app?” prompt) and would be denied the advantages of an improved UI. Moreover, as further discussed below, the competitive device UI will no longer be able to include a full-featured EPG, integrated search, or personalized recommendation engine — key features of TiVo’s UI today under the CableCARD solution.

The TiVo Representatives explained that differentiation and innovation in user interfaces is one the main benefits of a competitive device market and one of the main reasons a consumer would choose to use a competitive device. Indeed, the reason TiVo continues to market and sell competitive set-top boxes today while CableCARD-enabled smart TV’s did not gain acceptance in the market is that the latter provided little more than the same grid guide functionality as the MVPD UI and therefore gave consumers little reason to choose a competitive device over an MVPD-supplied leased set-top box. In contrast, TiVo continues to enjoy industry-leading customer satisfaction and reviewer ratings. The importance of innovation in the user interface and complementary features such as integrated search and a personalized recommendation engine is underscored in the recent reports that Apple is focusing on building an improved interface to watch content from a variety of sources and moving away from an “apps”-based approach that forces consumers to navigate separate apps.<sup>7</sup>

---

<sup>6</sup> See Tracey Smedley & Richard Washbourne, *The iTV Doctor Is In! What We’ve Learned So Far*, July 26, 2016, at [http://www.itvt.com/itv\\_doctor/10969/itv-doctor-what-weve-learned-so-far](http://www.itvt.com/itv_doctor/10969/itv-doctor-what-weve-learned-so-far) (citing a 1994 article from futurist Paul Saffo explaining that in a world of abundant content, “it’s not only about WHAT you watch; it’s about how the content is organized, and how you find it.”).

<sup>7</sup> Peter Kafka, *Apple’s New TV Plan is a TV Guide: Tim Cook Doesn’t Want to Sell You TV Anymore. He Wants to Tell You What’s on TV*, Aug. 4, 2016, at <http://www.recode.net/2016/8/4/12379572/apple-tv-guide>; Nathan McAlone, *Apple Has Changed Its Entire Approach to TV*, August 4, 2016, at

### Insufficient Program Guide Information

The MVPD Proposal would not provide competitive devices with sufficient information to enable a full-featured electronic program guide. While it is true that TiVo licenses guide data from third parties today, TiVo devices also receive service discovery, entitlement, and related information via the existing CableCARD solution — in particular, information on how to display (or “tune” to) a program currently in progress. The MVPD Proposal would no longer provide this necessary metadata to competitive devices. Therefore even if competitive devices obtain more detailed program information via licenses between manufacturers and third parties, such devices would still need access to data regarding channel line-ups, program title (or other ID) and start time, and other information needed to associate a program with the corresponding information licensed from a third party. Under the MVPD Proposal, competitive devices would not receive this information, nor a url or other locator needed to stream a program even if the user is able to locate and select it from a Guide.

In addition, the MVPD Proposal would not provide competitive devices with any information regarding MVPDs’ video-on-demand catalogs. Third party guide data does not provide information that would enable competitive devices to discover and tune to VOD programming — this factual information is only available from MVPDs.

### Integrated Search

The MVPD Proposal would neuter and fail to enable integrated search capability beyond a most basic form. As noted above, competitive devices would not be able to implement a full-featured EPG and would lack necessary information to “tune” to a program once it is selected — meaning that integrated search could only be implemented using a manual search rather than through more user-friendly browsing of available programs. Under the MVPD Proposal, MVPDs would not share entitlement data, meaning that a search query would return titles that a consumer cannot watch, leading to consumer frustration. Once a consumer selected a program, s/he would not be able to watch it directly, and would instead be directed to a landing page within the MVPD app. Competitive devices would also be prevented from receiving subscriber viewing information or other data from the apps or even create their own data for improving the UI. This means that the competitive device would not be able to provide a useful personalized recommendation engine based on what the consumer actually watches. This would eliminate one of the significant benefits of the FCC proposal that allows consumers to purchase devices that offer a user-friendly way to access both MVPD and OTT content and allows discovery of diverse and independent programming based on their interests.

---

<http://www.businessinsider.com/report-apple-has-changed-its-entire-approach-to-tv-2016-8>.

In order to provide true, fully functional integrated search capability, a competitive device requires:

- a way to import the list of available programs with a minimum set of data, as described in the Service Discovery information flow in the NPRM: “at a minimum, channel information (if any), program title, rating/parental control information, program start and stop times (or program length, for on-demand programming), and an “Entertainment Identifier Register ID”. The third party device can then license additional program information and use the ID to match across services.
- an API either in the MVPD app or directly to the MVPD cloud to make search requests or to retrieve a list of assets;
- entitlement and price information for both linear programming and VOD (a competitive device would not be truly competitive if it does not know what the user actually subscribes to if the MVPD device or app has this same information);
- in order to provide personalized and predictive search and recommendations, information regarding past viewership.

#### No Home Recording

Under the MVPD Proposal, competitive devices would not be able to record programming that they have paid to subscribe to, essentially removing one of the most important and well-recognized forms of fair use<sup>8</sup> — one that led to TiVo pioneering DVR technology. NCTA and AT&T say that some cable operators are implementing cloud-based recording,<sup>9</sup> but the MVPD Proposal would apparently prevent consumers using competitive devices from recording programming they have paid for and would give MVPDs a monopoly over this important consumer feature and the ability to eliminate all fair use rights.

#### Unworkable Licensing Regime

Under the MVPD Proposal, competitive device makers will have to enter into separate licensee agreements with each MVPD, a difficult if not impossible task for a retail manufacturer. While NCTA and AT&T state that they expect some common terms in all MVPD licenses, they acknowledge that the licenses will differ in material

---

<sup>8</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984); see also *Fox Broad. Co., Inc. v. Dish Network LLC*, 747 F.3d 1060, 1068-70 (9th Cir. 2014).

<sup>9</sup> MVPD Response to Questions at 10, 17.

ways.<sup>10</sup> It remains unclear whether competitive device manufacturers will know what the terms of the license are before they design their products, and whether it is possible for device manufacturers to build devices with innovative features that are portable nationwide and across MVPDs. NCTA and AT&T also assert that all MVPD licenses will include “commercially reasonable” terms that they will define unilaterally.<sup>11</sup> Though they concede that affected parties could file complaints regarding the licenses under Rule 1.41, they suggest no standard under which the FCC would review such complaints.

#### Unclear pricing/MVPD control

NCTA and AT&T are unclear as to whether apps will be available free of charge to consumers or whether programmers will be charged extra.<sup>12</sup> For example, they are unclear as to whether an outlet charge could be charged for each device used to view MVPD content. More importantly, NCTA and AT&T do not commit to not simply increasing fees in other areas — which they would be free to do since the subscriber would be forced to view all MVPD programming using the MVPD-supplied app. MVPDs would be free to charge consumers extra for “extra” features such as recording, fast forwarding, streaming to tablets or other mobile devices, etc., since competitive devices will not be allowed to offer such features.

#### Criticisms of CVCC’s Favored Approach Unfounded

NCTA and AT&T are simply incorrect in their criticisms of the CVCC’s suggestions to “bolt on” the use of information streams and related features to the MVPD Proposal to form a solution that would meet the requirements of Section 629 and the goals of the NPRM. As TiVo and other members of the CVCC have explained in the past, using information flows is what allows innovation and product differentiation among competitive navigation devices rather than simply allowing programming to be viewed on different screens.<sup>13</sup>

NCTA and AT&T claim that TiVo and other proponents of competitive navigation devices “continue to make it crystal clear” that they will not protect channel line-ups and other aspects of MVPD contracts with programmers.<sup>14</sup> This is simply untrue. TiVo and other members of the CVCC have stated clearly in the record that

---

<sup>10</sup> *Id.* at 21.

<sup>11</sup> *Id.* at 21-22.

<sup>12</sup> *Id.* at 24 (stating that “MVPDs *do not intend* for any additional fees to be incurred from or imposed on programmers for the HTML5 app” (emphasis added)).

<sup>13</sup> See, e.g., Letter from Robert S. Schwartz, Counsel to Hauppauge Computer Works, Inc. (on behalf of the Consumer Video Choice Coalition), to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 2-3 (July 1, 2016).

<sup>14</sup> MVPD Response to Questions at 26.

they support a requirement that competitive devices preserve channel line-ups, linear content streams (e.g., to not insert or overlay ads), consumer privacy protections, and other requirements via a uniform license similar to the existing DFAST license. Such a license can be devised in a non-discriminatory and transparent manner that protects the legitimate interests of programmers and MVPDs, while preserving room for innovation within the bounds of fair use.<sup>15</sup> The license can be implemented by a neutral body that respects MVPD, programming, device manufacturer, and consumer interests, and enforced using a digital certification requirement as has been described in the record.<sup>16</sup>

\* \* \*

---

<sup>15</sup> See NTIA Letter at 4-5 (urging the FCC to recognize the legitimate interests of programmers and MVPDs while identifying “elements of MVPD-programmer agreements that could hinder development of competitive navigation devices.”). The TiVo Representatives also noted that the recent letter from the Copyright Office to certain members of Congress takes an unduly broad view of copyright law that would stifle all forms of fair use and appears to misunderstand the capabilities of CableCARD-enabled devices today. See, e.g., Cory Doctorow, *Copyright Office to FCC: Hollywood Should Be Able to Killswitch Your TV*, August 4, 2016, at <https://boingboing.net/2016/08/04/copyright-office-to-fcc-holly.html>; Mitch Stoltz, Electronic Frontier Foundation, *Copyright Office Jumps Into Set-Top Box Debate, Says Hollywood Should Control Your TV*, Aug. 3, 2016, at <https://www.eff.org/deeplinks/2016/08/copyright-office-jumps-set-top-box-debate-says-hollywood-should-control-your-tv>; John Bergmayer, Public Knowledge, *Private Interests Don’t Override the Law – In Music Publishing, Cable Boxes, or Anywhere Else*, Aug. 5, 2016, at <https://www.publicknowledge.org/news-blog/blogs/private-interests-dont-override-the-law-in-music-publishing-cable-boxes-or-anywhere-else>; Annemarie Bridy, *Unlock the Box Meets Lochner*, Aug. 4, 2016, at <https://cyberlaw.stanford.edu/blog/2016/08/unlock-box-meets-lochner>.

<sup>16</sup> Letter from Robert S. Schwartz, Counsel to Hauppauge Computer Works, Inc., to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 7-8 (Aug. 3, 2016); Letter from Christopher L. Shipley, INCOMPAS, to Marlene H. Dortch, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 5 (Aug. 2, 2016).



Please direct any questions to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, reading "T. Devendra Kumar". The signature is written in a cursive style with a long horizontal flourish at the end.

Henry Goldberg  
Devendra T. Kumar  
*Attorneys for TiVo Inc.*

CC: Gigi Sohn  
Jessica Almond  
Eric Feigenbaum  
Scott Jordan